85-1035

No. ———

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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CROCKER NATIONAL BANK,
Appellant,

v.

PAUL PERDUE,
Appellee.

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On Appeal from the Supreme Court of the State of California

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the California Supreme Court erred in invalidating, in its entirety, a formal interpretive regulation of the Comptroller of the Currency providing that federal law preempts state price regulation of bank service charges on checking accounts offered by a national bank.

2. Whether the power of a national bank to "receive deposits" and related "incidental powers" under Section 24 (Seventh) of the National Bank Act authorize a national bank, notwithstanding contrary state price limits, to set the price terms on which it will receive deposits.

3. Whether the federal authority of the Comptroller of the Currency to examine and to seek modification of the service charge structure of a national bank preempts concurrent state jurisdiction to examine and to modify such service charges.

4. Whether a federal requirement that national banks set service charges for non-sufficient funds checks at levels designed to deter the writing of such checks by depositors preempts, as to national banks, a state requirement that such charges must be cost justified.

5. Whether federal bank-deregulation legislation preempts state price regulation of bank service charges on checking accounts offered by federally insured institutions.

PARTIES

The caption includes all parties. Although the complaint alleges that this case has been brought as a class action, no certification of a class has yet been made. Pursuant to Rule 28.1, appellant advises that its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates are Midland Bank plc, Crocker National Corporation, Midland California Holdings Ltd., Pacific Overseas Finance Corporation, and Crocker Servicos Limitada.*

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* On or about December 30, 1985, Midland California Holdings Ltd. will transfer the shares it currently holds in Crocker National Corporation (the parent of Crocker National Bank) to Midland America Corporation. Pacific Overseas Finance Corporation (a subsidiary of Crocker National Bank) has been sold as of the date hereof, subject to final approval by the Federal Reserve Board.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the California Supreme Court (App. A) appears at 38 Cal. 3d. 913, 216 Cal. Rptr. 345, 702 P.2d 503. The order of the Superior Court (App. B) and the decision of the Court of Appeal of the First Appellate District (App. C) are not published. The interpretive regulation of the Comptroller of the Currency appears at 12 C.F.R. 7.8000, and 48 Fed. Reg. 54319 (Dec. 2, 1983), *amended* 49 Fed. Reg. 28237 (July 11, 1984) (both App. I).

JURISDICTION

This is an appeal from a decision of the California Supreme Court reversing a judgment of dismissal by the trial court, and sustaining the application of a state statute, Cal. Civ. Code § 1670.5, as a basis for regulating

the amount of service charges of a national bank, against a claim that such application is preempted by federal law. Jurisdiction is based on 28 U.S.C. 1257(2). Judgment was entered below on July 18, 1985 (App. A). A timely petition for rehearing was denied on August 15, 1985 (App. E). The notice of appeal was timely filed on September 5, 1985, in the California Supreme Court (App. F). Should any issue herein not be appealable by right, appellant requests that this jurisdictional statement be treated as a petition for a writ of certiorari. 28 U.S.C. 2103 and 1257(3). 28 U.S.C. 2403(b) may be applicable.

STATUTES AND REGULATIONS AT ISSUE

The relevant texts of the applicable statutes and regulations are set forth in the Appendix as follows:

1. Sections 24 and 484 of the National Bank Act of 1864, 12 U.S.C. 24 (Seventh), 484 (App. G).

2. The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, 12 U.S.C. 3501-3505, and the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, 12 U.S.C. 3503(c) (both in App. H).

3. Interpretive Regulation of the Comptroller of the Currency, 12 C.F.R. 7.8000, 48 Fed. Reg. 54319 (Dec. 2, 1983), *amended* 49 Fed. Reg. 28237 (July 11, 1984) (App. I).

4. Comptroller's Handbook For National Bank Examiners (1977) (App. J).

5. California Civil Code Section 1670.5 (App. K).

STATEMENT

1. In a number of virtually identical class actions in California, including this case, various consumer plaintiffs challenge the right of various banks to set prices

at which they offer checking account services.[1] The plaintiffs contend that the marketplace has not properly valued the checking account services of banks and seek to have the courts reduce bank service charges (fees charged by banks for various services associated with checking accounts) to levels reflecting their "true value."[2] They also seek massive refunds of past bank service charges to the extent found to be "excessive." Appellant Crocker National Bank contends that such state price control is preempted, as to national banks, by the National Bank Act and, as to federally insured institutions, by federal legislation in 1980 and 1982 deregulating deposit accounts.

In 1983, the Comptroller of the Currency, the officer charged by Congress with administering national banking laws, issued a formal interpretive regulation directly

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[1] There are 28 such cases in California. Although the present case is not yet certified as a class action, several, including *Abascal* v. *Crocker National Bank* (San Francisco Sup. Ct. No. 720-309), are certified as statewide class actions and are close to trial. Fourteen cases, including those approaching trial, have been stayed pending the outcome of this appeal. Similar cases have recently been filed against national banks in Alaska, and plaintiffs therein have moved for a stay pending the outcome of this appeal. Other similar cases have been filed in Oregon and New York.

[2] The checking accounts at issue are ordinary checking accounts. When accounts are opened, the consumer becomes entitled to benefits resulting from the bank's duty to honor checks from sums on deposit and to pay interest, if it is an interest-bearing account. The consumer typically agrees to pay the bank's standard service charges for account-related services, including a monthly maintenance fee. Among other charges, banks typically charge a "returned item" charge when the consumer writes a check without sufficient funds and the bank returns it to the presenting party, and an "overdraft charge" when the consumer writes a check without sufficient funds and it is honored. The latter two charges are known as "NSF" charges because they relate to "non-sufficient funds" or "NSF" checks. The present case and all other NSF cases in California and, we believe, elsewhere seek to challenge both types of NSF charges.

on point (App. I). This ruling provides that state price regulation of a national bank's service charges is preempted by federal law. It provides that review and modification of the amount of such charges is exclusively the Comptroller's responsibility (App. I at 79a, 84a). The Comptroller also submitted a parallel argument in an *amicus curiae* brief to the California Supreme Court in this case (App. L). That court, however, held that state courts may regulate bank service charges in statewide class proceedings, and may invalidate any charge found to be "unreasonable" or "unconscionable" in amount, after hearing evidence on the "true value," cost, and justification for the charge. The court rejected all preemption arguments.

2. This purported class action was filed in the Superior Court in San Francisco in 1978 (App. D). Plaintiff is a Crocker checking account customer. He incurred a six-dollar returned item service charge when he wrote a check without depositing sufficient funds in his account (App. D ¶ 17). The complaint alleges that Crocker's charge is unenforceable because it allegedly "costs" a bank only thirty cents to process an NSF check (App. D ¶¶ 18, 45). Plaintiff seeks to require Crocker to "cost-justify" its NSF charges for returned items and for overdrafts. To the extent these charges are then determined to be "excessive," plaintiff seeks: (i) retrospectively, a statewide refund of past charges to a statewide class of all depositors; and (ii) prospectively, a court order requiring Crocker to process class members' NSF checks at a drastically reduced price in the range of thirty cents per NSF check.

Significantly, plaintiff does not allege that Crocker's NSF charges are excessive compared with market prices of other financial institutions. In fact, the complaint concedes (App. D ¶ 25) that the charge is "similar" to

NSF charges elsewhere in the market.[3] Nor is there any allegation of price-fixing or other anti-competitive behavior. The complaint does not deny, moreover, that Crocker has fully complied with consumer disclosure laws requiring written notice of service charges when the account is opened and before any later increase.[4] Indeed, plaintiff has conceded that he knew the amount of the charge (App. C at 42a, 46a, 49a). Consequently, this action, like many others now pending, is a frontal assault on the normal right of a bank to determine the price at which it will sell its services in the competitive marketplace.

The trial court dismissed the complaint for failure to state a claim (App. B). The Court of Appeal for the First Appellate District affirmed (App. C).

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[3] At the time the complaint was filed in 1978, Crocker's charges were $5 for an overdraft and $6 for a returned item. Each is currently $10. Today, similar charges range from $6 to $15 in California, *San Francisco Chronicle*, July 20, 1985, at 2, col. 2, and from $0 to $25 elsewhere in the United States. Sheshunoff, *Pricing Bank Services and Loans* 1-2 (1984).

[4] California Financial Code § 865.4 so requires. Under California rules of pleading, it is presumed that the law has been obeyed unless there is an allegation to the contrary. Cal. Civ. Code § 3548; *Associated Creditors Agency* v. *Davis*, 13 Cal. 3d 374, 402, 530 P.2d 1084, 118 Cal. Rptr. 772 (1975). The complaint does not allege that Crocker failed to comply with the disclosure law (App. A at 3a n.3, 5a n.6; App. D). Although the court below ambiguously stated at one point that Crocker had not furnished the depositor with the "applicable bank rules and regulations" (App. A at 3a), the court acknowledged that Crocker "post[ed] notice of its rates" (App. A at 5a & n.6). On the present record, it must be presumed that Crocker has provided consumers with the written price disclosures required by § 865.4. At all events, plaintiff has conceded herein that he was aware of the amount of Crocker's NSF charges (App. C at 42a, 46a, 49a).

The disclosure requirement of § 865.4 was part of a state statutory scheme to facilitate price competition and thus to facilitate regulation of prices by the marketplace.

3. The California Supreme Court reversed. It held that a bank does not have the right to establish the price at which it will sell its services in the marketplace. Although the court held that there was a valid deposit contract requiring the customer to pay the service charge (App. A at 7a), the court held that consumers may challenge the amount of service charges as "unconscionable" and may require banks to appear in proceedings under Section 1670.5 of the California Civil Code (App. K) to review the "justification" for the amount of any service charge. If the amount is found "unconscionable," the court may invalidate it (App. A at 7a-14a). The court also held that a bank's right to increase service charges from time to time is subject to a duty to set "reasonable" charges and that judicial review is available to determine whether any increase is "reasonable" (App. A at 7a). The court so held even though a consumer, after advance written notice of an increase, can close the account if the consumer believes the charge is unreasonable (App. A at 5a & n.6).

In determining whether a service charge is excessive or unconscionable, the court held the trial court may consider, among other factors: (i) the "cost" to the bank to provide the service; (ii) "the basis and justification for the price"; and (iii) the "true value" of the service (App. A at 11a).[5]

The breadth of the court's ruling is shown by its further holding that *even a price equal to or less than a prevailing market price may be so invalidated* (App. A at 11a-13a). Crocker pointed out below that no decision in the United States had ever declared unconscionable a contractual price term that was not excessive in relation to the *market* price for similar services. Crocker fur-

[5] Other factors include: whether the market structure is oligopolistic; the price paid by similarly situated consumers; the absence of meaningful choice; the lack of sophistication of the buyer; and the presence of deceptive practices (App. A at 11a-12a, 34a n.42).

ther noted, and the court acknowledged (App. A at 13a n.14), that plaintiff conceded that Crocker's charges were comparable to similar charges in the marketplace (App. D ¶ 25). No allegation of anti-competitive behavior, as stated, has ever been made in this case.

Even so, the court held that a market price of an *entire industry* may be invalidated. This could happen, the court stated (App. A at 11a), where the structure of the industry is "oligopolistic." By this, the court presumably meant that the trial court may conduct a full-scale industry review, *i.e.*, determining the relevant market, identifying its structure, and studying the pricing behavior of individual sellers, before determining if the contract price is enforceable. In addition, the court suggested that a market price of an entire industry may be set aside when an investigation of industry pricing behavior shows it is not "free and competitive" (App. A at 36a n.43). The court stated that a market is *not* "free and competitive" when sellers set prices simply "to minimize customer dissatisfaction" (*ibid.*). This illustrates the potential breadth of the decision, for it is generally believed that taking anticipated consumer responses into account in setting prices for goods and services is an important feature of price competition.[6]

4. Appellant and the Comptroller argued below that such state control of service charges of a national bank

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[6] The court stated (App. A at 36a n.43):

> Defendant consistently assumes throughout its argument that because its charges for processing NSF charges are within the range of fees charged by its competitors, its fees are the product of a free and competitive market. The conclusion does not follow from the premise. It may well be, as plaintiff charges, that banks do not compete in the setting of NSF check fees, but set fees arbitrarily, *deterred only by the desirability of minimizing customer dissatisfaction.*

(Unless otherwise indicated, all emphasis in citations herein is supplied.)

is preempted by federal law.[7] The Comptroller emphasized this position by issuing a formal interpretive regulation (App. I). The regulation states that national banks have the right, under federal law, to set the prices at which they will provide services in the marketplace, free of state price regulation and subject to review only by the Comptroller (*ibid.*). The court below dismissed the Comptroller's interpretive regulation as "palpably erroneous" (App. A at 28a). It declined to give deference to the Comptroller's interpretation of the national banking laws, and rejected all preemption arguments (App. A at 19a-37a). Those federal preemption arguments are now presented for this Court's review.

THE QUESTIONS ARE SUBSTANTIAL

1. *The Federal Power to Receive Deposits*

The National Bank Act empowers national banking associations to "receive deposits" and empowers them to exercise "all such incidental powers as shall be necessary to carry on the business of banking . . . ." 12 U.S.C. 24 (Seventh) (App. G). These provisions preempt the type of state price regulation of service charges of a national bank authorized by the decision below.

The analogy to *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), is very close. There, this Court held that precisely the same provisions of the Act preempted a state law prohibiting the words "saving" or "savings" in a national bank's advertisements. This Court explained:

> The United States has set up a system of national banks as federal instrumentalities to perform various

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[7] The preemption issue was raised initially in the state court of appeal. That court did not reach the issue, despite briefing by Crocker and the Comptroller, because it ruled in Crocker's favor on state law issues.

> functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories. *Some of their functions, especially as a source for federal credit, depend upon their success in attracting private deposits.*
>
> * * * *
>
> The National Bank Act authorizes national banks to receive deposits *without qualification or limitation*, and it provides that they shall possess "all such incidental powers as shall be necessary to carry on the business of banking . . . ."
>
> * * * *
>
> Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.

Id. at 375-77.

The case for preemption here is even more compelling. The decision below permits a state court to prohibit a national bank from receiving any deposits at all, except on drastically reduced price terms. The Comptroller, charged by Congress with the enforcement of the national banking laws, has determined that such restrictions "impair the ability of national banks to exercise their authority to take deposits under 12 U.S.C. 24 Seventh" (App. I at 78a). This conclusion seems plainly correct, for if the "useful" power to advertise to attract deposits cannot be denied, the *essential* power to set the price terms under which a national bank shall accept deposits surely cannot be abridged.[8]

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[8] Although the court below dismissed the Comptroller's formal interpretive regulation as "palpably erroneous" (App. A at 28a), deference to the Comptroller's interpretation is required. *First*, "the construction of a statute by those charged with its execution

The court below rejected the analogy to *Franklin*. It stated that the state advertising restriction in that decision impeded a bank's "ability to *attract* deposits" whereas, in the present setting, state price restrictions will not *deter* deposits (App. A at 31a). This is a meaningless distinction. A law requiring free checking accounts would be "attractive" to depositors, but few banks could afford to offer them. The test is not merely whether the state regulation deters deposits but also whether it *impairs* the efficiency of a national bank receiving deposits. *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *First National Bank* v. *Missouri*, 263 U.S. 640, 656 (1924). The price restrictions authorized below fail that test, for the following reasons.

First, the decision below authorizes state courts to deny the federal power to receive deposits, except on price terms set by state courts after years of litigation. This prohibition may apply even though the customer,

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should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-68 (1980); *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973). The Comptroller is charged with the execution of the national banking laws. *See* 12 U.S.C. 1, 9, 26, 93a, 161(a), 481, 482, 1818 *passim*. With respect to our argument concerning the 1980 and 1982 deregulation acts (*infra* at pp. 18-22), the Comptroller is a member of DIDC—the Depository Institutions Deregulation Committee established to carry out deregulation. 12 U.S.C. 3502 (App. H at 70a). *Second*, at least with respect to the Depository Institutions Deregulation Act of 1980 and its 1982 amendment (see p. 18, *infra*), the Comptroller was an active participant in the design of the legislation and has played a pivotal role in setting the DIDC machinery in motion. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). *Third*, where, as here, a body of law is complex and presents a risk of misstep, the Court has given even greater deference to the expertise of the agency required to interpret it. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *see also Merrill* v. *Federal Open Market Committee*, 516 F. Supp. 1028, 1032 n.11 (D.D.C. 1981).

after full disclosure, finds the price terms (including the NSF charge) acceptable, if not attractive, in the marketplace. *Indeed, this prohibition may apply even if accounts are offered at prices in line with or less than prevailing market prices.* This Court held in *Franklin* that "the National Bank Act authorizes national banks to receive deposits *without qualification or limit.*" 347 U.S. at 376. The pricing limitation imposed below is therefore in conflict with federal law.

Second, the decision below impairs the pricing and marketing flexibility needed to attract deposits. The national banking system depends, as this Court observed in *Franklin*, "upon the success [of national banks] in attracting private deposits." *Id.* at 375. In attracting deposits, a national bank may determine that a deposit account with lower charges for some services and higher charges for other services will attract deposits. For example, it might determine that a deposit account with a lower maintenance charge and higher NSF charges will be attractive to a potential class of customers.[9] The decision below denies the bank the right to offer such an account even to willing customers. Instead, the decision allows a plaintiff to isolate a single feature of the account and to impose on it a cost-benefit requirement without regard to the costs and benefits of the entire account. Plaintiff seeks to force the bank, in order to earn the same revenue on the account, to offer a package with prices *different* from those it determines will attract deposits. If "[m]odern competition for business finds advertising one of the most usual and useful of weapons," as this Court observed in *Franklin*, then flex-

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[9] A checking account is a single product, governed by a single agreement, comprised of a package of features with respect to interest and service charges, including typically a maintenance charge, a per-check charge, a minimum balance credit, a check printing charge, a returned check charge, an overdraft charge, and a stop payment charge, among others.

ibility in price competition is of equal, if not paramount, importance.

Since the bank deregulation acts of 1980 and 1982, the need for pricing flexibility is all the greater (see pp. 18-22, *infra*). The Comptroller's interpretive regulation states:

> deregulation, including the lifting of interest rate ceilings on numerous types of accounts, underscores the need for national banks to have *flexibility* in the establishment of deposit account service charges so that they may continue to pay depositors market rates of interest. * * * The safety and soundness of banks depends in significant part on their ability to devise price structures appropriate for their needs. * * * *It is the position of the Office that banks should have the ability to set service charges to encourage or discourage the use of certain services in line with the bank's goals and corporate requirements.*

(App. I at 78a-79a). To deny national banks the pricing flexibility needed to identify potential markets and to price deposit products to attract customers in those markets is an impermissible restriction on the federal power to attract deposits, just as the advertising restriction in *Franklin* impermissibly restricted that power.

Third, although state regulation is not needed to supplant price regulation by the market, it is important to stress that the "regulatory" scheme at issue imposes a number of extraordinary burdens not found in ordinary rate-making schemes. The decision below permits class action suits against banks to be filed in any court of general jurisdiction in any county in the state. Multiple suits on the same charge are thus permitted, as are multiple suits on different charges with overlapping cost issues. There are, for example, six separate purported class action suits pending against Crocker, filed in two different counties, that challenge its returned item, overdraft, and other charges (see note 2, *supra*). Various

plaintiffs have already begun to whipsaw banks by arguing that all or most cost items are relevant to some *other* charge in some *other* case, thereby decreasing the cost of the charge challenged in each case. There is no guarantee, when all service charges are eventually litigated for any given time period chosen by individual plaintiffs, that all cost items will be recognized and recovered. The risk of inconsistent findings is evident, as is the risk of inconsistent definitions of undefined terms like "cost" and "unconscionable." [10] Common law courts are simply not equipped, as are utility-regulating agencies with comprehensive and unified rate-making powers, to minimize or eliminate these extraordinary burdens.

Worse, plaintiff seeks, as stated, artificially to isolate a single feature of the integrated deposit account and to force retroactive refunds of that charge. In the various NSF cases against Crocker alone, plaintiffs seek many millions of dollars in refunds, reaching back to 1973. If plaintiffs prevail, Crocker will be forced to refund substantial sums, but will be unable to recover the lost revenue by retroactively adjusting other charges. Under usual rate-making procedures, this problem is solved by establishing price terms in advance and providing the regulated entity a guaranteed return on investment. In contrast, under the scheme plaintiff advocates, a national bank must grit its teeth through years of multiplicitous and prolix litigation in different courts, all the while accruing massive potential liability, before it will learn, after the fact, whether its charges for any given time period were valid.

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[10] The decision below announced no standards for determining "cost." Plaintiffs argue for marginal cost. Defendants argue for fully allocated costs. And, there is also inherent uncertainty in defining "unconscionability," a problem even Perdue's counsel characterized below as "like trying to nail a blob of jelly to a wall" (Petition for Hearing in California Supreme Court at 13).

2. *The Exclusivity of the Comptroller's Power to Review Pricing by National Banks*

To assure the safety and soundness of the national banking system, the National Bank Act confers comprehensive review and enforcement powers on the Comptroller. These include the power to issue, to withhold, and to suspend charters of national banking associations; to conduct examinations of the operations of each association respecting the safety and soundness of its operations and compliance with applicable law; and to issue cease and desist orders to enjoin unsound practices. *See* 12 U.S.C. 1, 9, 26, 93a, 161(a), 191, 201-211, 481, 504, 1812, 1817, 1818, 1821(c), 1972; *Comptroller's Handbook For National Bank Examiners* § 1.1 at 1 (1977) ("*Handbook*") (App. J at 87a).

Periodic bank examinations are one of the Comptroller's most important means for assuring the safety and soundness of national banks. During examinations, all significant operations of the association, including the revenue base and the bank's program "to retain and expand the bank's deposit base," are reviewed (App. J at 89a). Service charges are reviewed because they must be "established with consideration of their impact on the financial health and profitability of the bank" (App. I at 84a). Based on the examination, the Comptroller may seek to require a national bank to modify its pricing or other practices (App. J at 87a-88a). The report of examination is confidential and may not be disclosed in any manner. 12 C.F.R. 7.6025(c) (1985).[11]

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[11] The Comptroller recognizes his authority and responsibility "to deal with instances of unacceptable pricing," and the interpretive regulation states "the Office will continue to review all banking practices, primarily through its examination process, and to take appropriate action when warranted" (App. I at 82a, 84a). The regulation anticipates that such instances will rarely arise and that the market itself will regulate the amount of service charges as financial institutions compete for deposits (App. I at 80a).

The comprehensiveness of the "visitorial powers" of the Comptroller is made clear in Section 484 of the Act, which provides that the Comptroller's review powers are exclusive:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. 484.

The Comptroller, Congress, and the courts have uniformly construed Section 484 as precluding state actions to review bank compliance with state law. The Comptroller so ruled in 12 C.F.R. 7.6025(b) (1985). Congress made this plain in the original Section 484 and in a 1982 amendment. Before 1982, the Comptroller's visitorial authority was unqualified. The 1982 amendment created a limited exception to Section 484, permitting state officials to review the records of a national bank "*solely* to ensure compliance with applicable State unclaimed property or escheat laws. . . ." Pub. L. 97-320, 96 Stat. 1469, 1521, *codified at* 12 U.S.C. 484(b). *Accord* S. Rep. No. 536, 97th Cong., 2d Sess. 29 (1982). Similarly, the courts have regularly held, insofar as a national bank is concerned, that enforcement of state law (with minor exceptions not relevant here) is exclusively the province of the Comptroller and that any attempt directly to enforce such state law under state authority is preempted. *Pennsylvania Bankers Ass'n* v. *Commonwealth, Bureau of Consumer Protection*, 58 Pa. Commw. 170, 427 A.2d 730, 732 (1981) (state enforcement of state bank collection law preempted by § 484); *National State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 988-89 (3d Cir. 1980) (state enforcement of New Jersey anti-redlining statute preempted by § 484).

Despite the pervasive federal power to review bank service charges, the court below held that state courts

have "dual jurisdiction" to review and to modify the pricing structure of a national bank's services.[12] To be sure, there is a history of dual regulation of some aspects of banking in this country (App. A at 27a). But where review and modification of the service charge structure of a national bank are concerned, there is room for only one regulator. *First*, Section 484 expressly provides that only the Comptroller shall have access to the data needed to regulate.[13] *Second*, as stated, only the Comptroller has the authority to seek enforcement of any valid state law (*Long, supra*; *Pennsylvania Bankers Ass'n, supra*). *Third*, after the national bank examiners review a national bank's service charges and decide *not* to seek modification, a state court may not order a reduction in revenue without impermissibly altering the calculus on which the examination was made. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 149 (1980) (state action preempted where it would upset the "federal calculus" for determining revenues); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (federal decision *not* to regulate preempts state attempt to regulate). Such alterations can nullify the Comptroller's determination concerning the safety and soundness of the financial operations of the bank. Moreover, if retroactive refunds are ordered, several years of bank examinations can be upset,

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[12] Contrary to the opinion below, neither Crocker nor the Comptroller have ever argued against the dual system of banking regulation (App. A at 34a). Rather, they have argued that state *price* regulation is not permitted.

[13] Recognizing the force of Section 484, the court below allowed that Section 484 might restrict the ability of plaintiff "to examine records by way of discovery, or to subpoena such records at trial" (App. A at 21a n.21), but held that the action itself would not be preempted, only plaintiff's methods of proof. This ruling, however, eviscerates the exclusivity of the Comptroller's power to examine bank-wide operations by nonetheless authorizing inquiries by state courts into bank-wide financial operations, and conflicts with the decisions in *Pennsylvania Bankers Ass'n* and *Long, supra*.

especially where, as here, vast sums are sought.[14] *Fourth*, a national bank cannot present the results of the federal examination as evidence in state court by virtue of the confidentiality rule of 12 C.F.R. 7.6025(c). This means that a national bank would be powerless to explain to a state court the approval or modification of its fee structure by federal authority. Indeed, federal authorities could seek to require a national bank *to increase* its service charges and, under Section 7.6025(c), the bank could not so advise the state court.

For these reasons, insofar as the review and modification of a national bank's service charge structure is concerned, Congress has necessarily preempted state jurisdiction and made the Comptroller the exclusive regulator. Dual regulation of deposit account price terms "stands as an obstacle" to the statutory duty of the Comptroller and must yield. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *see also Conference of Federal Savings & Loan Ass'ns* v. *Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

3. *The Federal Requirement to Price to Discourage NSF Checks*

Pursuant to the Comptroller's plenary authority to require sound banking practices, 12 U.S.C. 481, the Comptroller has directed that national banks set their NSF charges sufficiently high to deter the writing of NSF checks. Since 1977, Section 301.1 of the Comptroller's *Handbook* has expressly provided that "[o]verdraft charges should discourage frequen[t] usage" (App. J at 91a). Similarly, the Comptroller's interpretive regulation states, "it has been the Office position that service charges should discourage customers from frequently writing checks in amounts greater than their account balances" (App. I at 83a).

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[14] *See City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 639 (1973); *Maryland* v. *Louisiana*, 451 U.S. 725, 749-52 (1981); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 338-340 (1983) (all preempting state law in analogous circumstances).

This has two preemptive effects. *First*, after a national bank has tried to comply with the federal mandate by setting its NSF charges at levels that are high enough to discourage overdrafts, a state court should not be permitted, after the fact, to substitute its judgment and to order massive refunds. Such second-guessing will deter national banks from seeking to comply with the federal requirement in the first place, and thus "stands as an obstacle" to the federal requirement. *See Hines* v. *Davidowitz*, 312 U.S. at 67; *Capital Cities Cable, Inc.* v. *Crisp*, —— U.S. ——, 104 S. Ct. 2694, 2707 (1984).

Second, after a federal bank examiner has reviewed the NSF charges of a national bank for compliance with the federal requirement of Section 301.1 and decided not to disturb them, a state court cannot order a reduction in those charges without nullifying the federal determination. Yet this is precisely what the decision below expressly contemplates (App. A at 34a n.42). As before, this impermissibly intrudes into a domain reserved by Congress to federal authority.

4. *The Federal Deregulation Acts*

The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, and the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, establish a significant federal banking policy—the price deregulation of all deposit accounts at all federally insured institutions. These Acts require financial institutions to compete for deposits on the basis of price and to pay market interest rates on deposits.

Before the 1980 Act, Regulation Q and related provisions, 12 C.F.R. 217.7, 329.6, 526.3 (*repealed* 1980), had prohibited national banks and federally insured savings and loan associations from paying more than 5¼% and 5½% interest, respectively, on short term time deposits of less than $100,000. By 1979, however, this ceiling, which was substantially lower than rates otherwise

available, had produced a severe liquidity problem among the nation's financial institutions. This problem was "disintermediation"—the rapid exodus of deposits from regulated institutions into "money-market" funds paying market rates of interest and interest-bearing NOW accounts. *See* S. Rep. No. 368, 96th Cong., 1st Sess. 3-5 (1979).[15]

To meet this mounting problem, the 1980 Act established the Depository Institutions Deregulation Committee ("DIDC") and directed DIDC to phase out all price regulation of interest rates paid by national banks and other affected financial institutions. This was to be done "as rapidly as economic conditions warrant" and with "due regard for the safety and soundness of depository institutions." 12 U.S.C. 3503 (App. H at 71a). The 1980 Act also authorized federal institutions to offer interest-bearing checking accounts (NOW accounts), 12 U.S.C. 1832(a) (App. H at 74a-75a), which had previously been prohibited. The Act adopted a national policy of requiring interest rates on deposit accounts to be set by the marketplace, for as Senator Proxmire stated in introducing the 1980 Act, "the market is the most efficient mechanism we have to allocate resources in our economy." 125 Cong. Rec. S7730 (daily ed. June 14, 1979).[16]

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[15] These conclusions concerning Regulation Q and NOW accounts had been reached earlier by the President's Inter-Agency Task Force on Deposit Interest Rate Controls and Housing Credit. *See* Message from President Carter to the House of Representatives Transmitting Recommendations for Comprehensive Financial Reform Legislation, H. Doc. 96-129, 96th Cong., 1st Sess. (May 22, 1979).

[16] *Accord* S. Rep. No. 368, 96th Cong., 1st Sess. 5 (1979); 125 Cong. Rec. H2506 (daily ed. May 1, 1979) (remarks of Rep. St Germain); *Depository Institutions Deregulation Act of 1979, Part II: Hearings Before the Subcomm. on Fin. Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 89, 97 (1979) (testimony of Comptroller). For similar comments concerning the 1982 Amendment, *see Competition and Conditions in the Financial System, Part I: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 51, 55 (1981) (remarks of Vice Cha., Bd. of Gov.

Significantly, Congress repeatedly recognized that if financial institutions were to increase their interest rates on deposits, they also would have to increase their service charges on deposits. As Senator Cranston said, for example, in the Senate Report, "if institutions are going to pay higher interest rates . . . , institutions are going to have to charge more for the services they offer and the money they lend." S. Rep. No. 368 at 39. *Accord* 125 Cong. Rec. S7726 (daily ed. June 14, 1979) (Senator Cranston). Senator Morgan likewise stated that institutions would have to "pass these [interest] costs on in the form of service charges . . . ." S. Rep. No. 368 at 37-38. In the House, Representative Annunzio "time and time again . . . pointed out . . . that while consumers [might earn more interest] they would also face higher interest rates on loans and additional service charges." BNA, *Daily Rep.*, No. 3, Jan. 6, 1984 at A-10.

In light of the necessary relationship between interest and service charges, Crocker and the Comptroller argued below that state price limits on service charges stand as an "obstacle to the accomplishment and execution of the full purposes and objectives" to pay higher interest and are thus preempted. *Hines* v. *Davidowitz*, 312 U.S. at 67.[17] The court below recognized that "Congress clearly

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of the Fed. Res. System); *id.* at 31, 33 (remarks of Donald T. Regan, Secretary of the Treasury).

[17] Appellant also argued below that Congress directed DIDC to weigh, in deciding the pace of deregulation, the potential impact of each incremental step on the "safety and soundness" of affected institutions against the goal of achieving deregulation "as rapidly as economic conditions warrant." 12 U.S.C. 3503(a) (App. H at 71a). Congress thus entrusted to DIDC a task of delicate balancing. Crocker argued that any state limitation on service charge income of affected institutions in California would impermissibly interfere with this balancing, especially here, where plaintiff seeks to force the institution to charge *far* less than market rates. To permit such limitations on a major component of income would, in effect, reweigh the balance struck by DIDC and would undermine the judgments drawn by DIDC concerning the safety and soundness of national banks and the desirable pace of deregulation. In such circumstances, state laws have been regularly held preempted.

anticipated that banks would be able to charge fees for depositor services sufficient to recover the cost of such services" (App. A at 35a). It held, however, that the state laws in question permitted the recovery of "the cost" of the services and a "reasonable profit" (*ibid.*), that Congress had mandated nothing more, and that the Comptroller's determination that greater flexibility is needed is "palpably erroneous" (App. A at 28a).

This was error. *First*, although the decision below purports to allow recovery of all costs, in fact, it permits the artificial isolation of a single feature of the integrated deposit account and the imposition of a cost-benefit requirement solely on that feature, without regard to the costs and benefits of the entire account. To isolate artificially a single feature in this way can push the overall economics of the account into a loss position. The decision below does *not*, therefore, necessarily allow recovery of all costs. It is the totality of costs that determines how much interest can be paid on the account.

Second, in order to pay *market* interest rates on deposits, a bank must be able to earn *market* service charges on deposits. Otherwise, the bank will be at a competitive disadvantage in its ability to pay market interest. The decision below, however, holds that even a service charge priced *at market*, as here (App. A at 13a n.14), can be set aside (App. A at 11a-13a). This stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is therefore preempted. *Hines* v. *Davidowitz*, 312 U.S. at 67.[18]

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. at 340; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 149. Although the court did not address this argument, it was presented below and thus preserved for this Court's review.

[18] The decision below also made a point of the fact that Congress expressly preempted certain usury laws but did not expressly preempt state regulation of service charges (App. A at 32a). In fact, Congress cut free the only two types of price regulations then affecting depository institutions—Regulation Q and state usury laws—so that both costs and revenues would be subject to the inter-

Third, the decision below seeks to impose state law limitations on service charges, contrary to the Comptroller's affirmative decision in his interpretive regulation that, in light of the deregulation acts, such charges should ordinarily be regulated by competitive market forces and subject to agency review (through the national bank examination process) only in "instances of unacceptable pricing" (App. I at 82a). Where, as here, the failure of federal officials " 'affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. at 178 (citations omitted). Thus, the Comptroller's decision *not* to regulate service charges except in extraordinary circumstances preempts state regulation of those charges.

5. *The Need for Review*

These federal issues warrant review at this time. *First*, a formal interpretive regulation of the Comptroller of the Currency has been held invalid, indeed "palpably erroneous" (App. A at 28a). Without review, the

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active forces of the competitive market. *Although no provision of the Act expressly preempts any state limits on service charges, the clear understanding of Congress was that there were no such limits and no explicit preemption was necessary (as was necessary for state usury laws, which did exist).* In fact, as stated, Congress expressly recognized that service charges would go up to allow payment of market interest rates on deposits. Moreover, the passage from the Senate Report cited by the court below (App. A at 32a n.37) does *not* hold that Congress intended that service charges on deposits should be governed by state law, but merely holds that certain loan-related charges were not preempted.

The court below also argued that a uniform requirement of "reasonable" rates on all industries was not, in effect, a form of regulation (App. A at 36a). This Court, however, has repeatedly held that common-law actions, such as tort actions, are forms of state regulation that may be preempted. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981).

regulation will not be effective in California but will presumably continue to be accepted as valid elsewhere in the country. This gap in uniform construction on an important issue of federal banking law warrants review.

Second, the decision below squarely conflicts with the decision in a virtually identical case in New York, which held that federal law preempts any challenge to the amount of national bank service charges. *Jacobs* v. *Citibank, N.A.*, 61 N.Y.2d 689, 462 N.E.2d 1182, 1183, 474 N.Y.S.2d 464 (Ct. App. 1984) (upholding an earlier version of 12 C.F.R. 7.8000 and dismissing challenge to NSF charge). Although the court below tried to distinguish *Jacobs* on the ground that it arose on summary judgment rather than, as here, a motion to dismiss, the controlling issue in both cases is a legal issue of federal preemption. The two holdings plainly are in conflict on that issue. The decision below also conflicts with decisions preempting state enforcement of consumer laws in light of the exclusive visitorial powers of the Comptroller under 12 U.S.C. 484. *Pennsylvania Bankers Ass'n* v. *Commonwealth, Bureau of Consumer Protection*, 58 Pa. Commw. 170, 427 A.2d 730, 732 (1981); *National State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 988-89 (3d Cir. 1980).

Third, there is an extraordinary need for certainty. In the wake of deregulation, considerable dispute has arisen concerning the power of financial institutions to increase their service charges to pay higher interest rates on deposits. Numerous lawsuits are pending nationwide challenging the service charges of various banks. In California alone, there are 28 such actions, 14 of which have been stayed pending the outcome of this appeal. Similar actions have been filed in Oregon, New York, and Alaska. The federal preemption issue is pivotal and dispositive in virtually all of these suits, at least as to all national banks and federally insured institutions. The need for certainty in the face of these disputes was the reason the Comptroller promulgated his interpretive regulation (App. I at 77a). That need per-

sists. Until the federal preemption issue is authoritatively resolved, extraordinary sums in potential liability will accrue to the nation's banking system.[19]

Appellee will no doubt argue that there will be time enough to review the *Perdue* decision after it has run its course on remand.[20] This approach, however, would

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[19] The amount of service charge income of Crocker and Bank of America alone is, even according to NSF plaintiffs, "well over $200,000,000 *annually*." Amicus Brief to California Supreme Court of Certified Class Plaintiffs in NSF Litigation at 6.

[20] An otherwise non-final state court judgment is immediately reviewable where: (1) "the federal issue has been finally decided"; (2) the party seeking review "might prevail on the merits on non-federal grounds"; (3) reversal by this Court "would be preclusive of any further litigation on the relevant cause of action"; and (4) "refusal immediately to review the state-court decision might seriously erode federal policy . . . ." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975).

All four factors are present here. The federal issue—preemption of state price regulation of deposit account service charges—has been directly addressed and "finally decided" below. Appellant "might prevail" after remand on non-federal grounds, thereby cutting off this Court's ability to review the substantial federal issues presented here. Reversal by this Court "would be preclusive" of further litigation on the question of state-court regulation of deposit account service charges. And refusal to grant immediate review would "seriously erode" the congressional policy requiring federally insured financial institutions to set the amount of those charges at market levels, and would undermine the clear mandate of the 1980 and 1982 deregulation acts and the Comptroller's interpretive regulation. As stated in *Cohn*, to deny immediate review would only invite " 'the mischief of economic waste and of delayed justice,' " 420 U.S. at 478 (citation omitted).

Moreover, denial of immediate review in this case poses the real danger that this Court will be denied the "opportunity to pass on the federal issue and as a result 'there would remain in effect the unreviewed decision of the State Supreme Court' holding that the California statute" was not preempted. *Southland Corp.* v. *Keating*, 405 U.S. 1, 6 (1984) (citation omitted). Denial of immediate review would open the door to prolonged and multiplicitous litigation, in direct contravention of the "core purposes," *id.* at 7, of the federal rights appellant seeks to vindicate. *See also Belknap* v. *Hale*, 463 U.S. 491, 498 n.5 (1983) ("our grant of the petition for certiorari

deny the essence of appellant's federal claim, for it would require appellant to submit to the very process that burdens the federal right. Regardless of how strong their case, few, if any, financial institutions can be expected to weather the years of litigation and trial risk on the state law issues created by the decision below, all the while accruing large potential liability, to preserve a federal claim for ultimate review here. The applicable standards are uncertain. The realities of litigation do not favor banks. NSF charges are unpopular. The sums at issue are large. The cost of litigation and extensive bank-wide cost-accounting studies is substantial. These burdens and risks support resolution of the federal claims at this point, for those claims, if sustained, are dispositive of the relevant causes of action. The federal claims have been finally and authoritatively rejected by the California courts. If the federal right is to be effectively vindicated, there is unusual need for review at this time.

Respectfully submitted,

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. . . was not infirm because of the lack of a final judgment; and our jurisdiction to affirm or reverse . . . on the preemption issue, an issue which is not by any means frivolous, is clear").

Indeed, the right of appeal from a pretrial ruling rejecting a claim of federal preemption is so clear-cut that this Court has at times asserted jurisdiction without even discussing the issue. *See, e.g., Fidelity Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982); *Third National Bank* v. *Impac Ltd., Inc.*, 432 U.S. 312 (1977).